AND
BRIEF

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In the Supreme Court of the United States

TC HEARTLAND, LLC,

Petitioner,

v.

KRAFT FOOD BRANDS GROUP, LLC,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF AMICUS CURIAE PAUL R. MICHEL IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF THE ARGUMENT 1

ARGUMENT 2

I. PETITIONER MAKES A POWERFUL LEGAL ARGUMENT FOR WHY THE FEDERAL CIRCUIT'S VENUE LAW CONFLICTS WITH THE STATUTE 2

II. THIS CASE WILL AFFECT THOUSANDS OF PATENT INFRINGEMENT CASES FILED EACH YEAR 3

CONCLUSION 8

TABLE OF AUTHORITIES

Page(s)

Cases

Alice Corp. v. CLS Bank Int'l,
573 U.S. __, 134 S. Ct. 2347 (2014) 6

Markman v. Westview Instruments, Inc.,
517 U.S. 370 (1996) 6

Mayo Collaborative Servs. v. Prometheus Labs., Inc.,
566 U.S. __, 132 S.Ct. 1289 (2012) 6

Teva Pharmas. USA, Inc. v. Sandoz, Inc.,
574 U.S. __ (2015) 6

VE Holding Corp. v. Johnson Gas Appliance Co.,
917 F. 2d 1674 (Fed. Cir. 1990) 2

Statutes

28 U.S.C. § 1400(b) ..... *passim*

28 U.S.C. § 1391(c) 2

28 U.S.C. § 1391(c) 3

INTEREST OF THE AMICUS CURIAE[1]

Amicus Curiae Paul R. Michel is a retired Chief Judge of the United States Court of Appeals for the Federal Circuit, the reviewing court for essentially all patent rulings. Judge Michel has a strong interest in offering neutral, impartial advice to the Court on the Court's resolution of patent issues so as to advance innovation, here the proper requirements for venue in patent litigation. On the basis of his service on the court for over 22 years, hearing thousands of patent appeals, he may have insights of use to the Court.

SUMMARY OF THE ARGUMENT

Petitioner has made a forceful legal case for why Section 1400(b) should alone control venue determinations in patent cases, particularly after the 2011 AIA amendments.

The Federal Circuit's contrary reading of the statutes has created numerous practical negative consequences. It has led to concentration of most patent litigation is a select few district courts, which is bad for positive development of patent law. Such concentration prevents the Federal Circuit from receiving diverse views about how patent law should change to keep up with ever-changing technologies. It

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae* or his counsel made a monetary contribution to its preparation or submission. Pursuant to Rule 37.2, *Amicus* notified counsel of record for all parties of its intent to file an *amicus* brief. *Amicus* understands that Petitioner and Respondent have both consented to the filing of this amicus brief.

also forces corporate defendants to litigate the bulk of their cases far from any of their actual operations. And it leads defendants to be uncertain about the future of the law in this area, and to make wasteful attempts to obtain proper venue for their cases. The Court should grant certiorari to consider whether patent plaintiffs should be able to pick essentially any venue in the country, or are properly limited by Section 1400(b).

ARGUMENT

I. PETITIONER MAKES A POWERFUL LEGAL ARGUMENT FOR WHY THE FEDERAL CIRCUIT'S VENUE LAW CONFLICTS WITH THE STATUTE

The Petititon in this case ably demonstrates why venue law in the Federal Circuit is in need of reconsideration. Specifically, Section 1400(b) is clear on its face, and the 1988 amendment of Section 1391(c) did not change the applicability of this Court's decision in *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 226 (1957). Moreover, the 2011 Amendments of Section 1391(c) removed the language on which the Federal Circuit had relied in its decision in *VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574 (Fed. Cir. 1990).

Petitioner's argument is thus powerful on the law. In the next section, I explain from first-hand knowledge why resolution of the issue by this Court is important to proper operation of the patent system.

II. THIS CASE WILL AFFECT THOUSANDS OF PATENT INFRINGEMENT CASES FILED EACH YEAR

The practical effect of a decision in this case is enormous because it will control how patent infringement suits—nearly 5,000 every year—are distributed in district courts across the country. After *VE Holding* excused patent owners from complying with the special patent venue provisions of Section 1400, many patent owners selected any district in which an infringement had occurred—essentially any district in the entire country for corporate defendants that had a national sales presence.

Some accused corporate defendants sought transfer under Section 1404 to a convenient venue that was consistent with Section 1400(b). Some unsuccessful transfer movants then sought mandamus review at the Federal Circuit when the transfer motion was denied. One of the earliest mandamus petitions was granted, and several others followed in rapid succession. But the Federal Circuit denied most. The petitions were handled in the ordinary course by the monthly motions panel whose membership rotates among all the Federal Circuit judges. Amicus believes he was on the panel that granted the first.

Mandamus is an unsatisfactory approach for resolving improperly-venued cases, however. The transfer motions delay proceedings and require additional consideration by the trial judge and wasted effort by the appellate court that could be avoided by requiring the patent owner to select a venue consistent with the special patent venue provisions of Section 1400(b) in the first place. Moreover, transfers based on a more convenient forum under Section 1404

are many-factored and thus result in unpredictability, which leads to further wasting of resources by parties and the courts. The situation, then, from *VE Holdings* and its progeny, is one in which the underlying legal basis for venue is questionable and the practical result is waste, delay, and uncertainty.

This result is directly contrary to what Congress intended when it established the Federal Circuit. As lead-up to the creation of the Federal Circuit in 1982, Counsel for Amicus joined President Carter's Advisory Committee on Industrial Innovation, at the recommendation of Congressman Drinan. That Committee was tasked to formulate solutions to an innovation crisis that was perceived at the time. As part of its duties, the Commission produced a recommendation for a single patent appeals court to unify a then-fractured state of the patent law. Along with the goal of legal consistency came a goal of eliminating forum shopping by patent owners and accused infringers, where each would previously seek to sue in a circuit that was perceived to be either pro-patent or anti-patent.

But the present rule returns a very similar form of district court-level forum shopping for many patent owners. Patent litigation has become more-and-more concentrated in a few select district courts because certain patent owners find those districts to be preferable—whether for legitimate or illegitimate reasons. And corporations have found themselves having to answer in those district courts, often halfway across the country from where they reside or have places of business, and where they have comparatively little commercial activity. So a substantial portion of innovative commerce is now

being adjudicated far from where it is occurring, and with comparatively little diversity in viewpoints.

The problem has been exacerbated for a certain class of patent owners that seek small settlements with many defendants. Such patent owners can sue numerous corporate defendants in a favorable district and seek settlements from each for a sum too small for an accused corporate defendant to justify litigation, even if the patent is weak. That price may be less even than the cost of attempting to transfer the case to a more appropriate forum. And the cost even of starting a litigation in a distant forum can force settlement where a case has no merit. In short, the current approach to venue raised problems from the start, and those problems have grown ever-greater over time.

The concentration of more cases in fewer district courts also undermines two beneficial programs instituted by the Federal Circuit's first Chief Judge, Howard T. Markey—which have continued to this day. First, district judges from across the country have been invited to sit with the Federal Circuit so as to allow them to better understand the workings of the Federal Circuit and vice-versa. During my tenure as Chief Judge (2004-2010), over 30 district judges were invited to sit with the court. Only two declined, one for health reasons and the other for overloaded docket and recent illness. All others were eager to participate and came from many different districts around the country. All the district judges prepared diligently and contributed significantly to the argument, conference, and decision-making as well as the crafting of opinions. Second, the annual circuit judicial conferences draw large numbers of district judges and lawyers from throughout the nation.

Mutual understanding between the Federal Circuit and district judges has increased steadily as a result. So has the quality of the work at both levels. Separate from these two programs is the sitting of Federal Circuit judges as trial judges in various districts, and the hearing of oral argument by the Federal Circuit at different locations across the country (including in Southern California just this month). Yet the thinning of the patent case load away from many of these districts minimizes the overall benefit that these programs provide to the judiciary and the bar.

Because there is a single patent court at the intermediary appellate level, it is critically important to receive a wide range of views from the district courts. The issues on which the Federal Circuit receives critical aid from the district courts include many from recent decisions of this Court that changed the substantive patent law, including for claim construction in *Markman* and *Teva*, obviousness determinations under *KSR*, new thinking on patent damages rulings (whether utility or design) which typically receive substantial deference, and the more-important-than-ever determinations of patent eligibility under *Mayo* and *Alice*.[2] The thinking on all of these issues, in developing a national body of patent law, suffers when cases are concentrated in a small number of districts.

There is some sentiment that patent owners should have wide choice of venue in infringement cases. But that view has to be balanced against the

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[2] *See Teva Pharmas. USA, Inc. v. Sandoz, Inc.*, 574 U.S. __ (2015); *Alice Corp. v. CLS Bank Int'l*, 573 U.S. __, 134 S. Ct. 2347 (2014); *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 566 U.S. __, 132 S.Ct. 1289 (2012); *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996).

negative practical results of such an approach, it is contrary to the reality that many patent owners choose only a select handful of jurisdictions, and it is at least arguably inconsistent with this Court's venue decisions and subsequent legislation, as the Petition explains. And the argument is at most a policy argument that Respondent can make to this Court, but it is not a reason for this Court to decline to resolve the uncertainty that hovers over the law in this area. Courts that strictly follow *VE Holdings* have ignored the purpose of Congress in limiting venue for patent infringement cases to locations where an accused infringer resides or has committed acts of infringement and has a regular and established place of business. The result has been to limit patent infringement cases to a few overloaded jurisdictions inconvenient to most accused infringers and innovative corporations while depriving the Federal Circuit the benefit of reviewing patent trials managed by able trial judges in the rest of the country. These holdings misinterpret 1400(b) as amended in 2011, reverting the language essentially back to the pre-1988 text whose virtually identical predecessor was construed by the Court as the only venue provisions for patent infringement cases. The Federal Circuit, of course, is bound to follow the decisions of this Court.

Regardless of the view the Court adopts, the question presented urgently needs the Court's answer.

CONCLUSION

Amicus respectfully submits that the Court should grant certiorari and to consider whether Section 1400(b) is the sole provision defining venue in patent infringement cases.

Respectfully submitted.

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